

Original

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

RECEIVED

SEP - 3 2002

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)	FCC 02-201
)	
Amendment of Section 73.202(b),)	MM Docket No. 98-112
Table of Allotments, FM Broadcast Stations)	RM-9027
(Anniston and Ashland, AL, College Park,)	RM-9268
Covington, and Milledgeville, Georgia))	RM-9384

To: The Commission

**MOTION FOR LEAVE TO SUPPLEMENT
PETITION FOR RECONSIDERATION
AND SECOND MOTION TO REOPEN THE RECORD**

**PRESTON W. SMALL
Timothy E. Welch, Esq.
Hill and Welch
1330 New Hampshire Ave., N.W. #113
Washington, D.C. 20036
(202) 775-0070
(202) 775-9026 (FAX)
welchlaw@earthlink.net**

No. of Copies rec'd 014
List ABCDE

September 3, 2002

Preston W. Small (Mr. Small), by his attorney, hereby seeks leave to supplement his August 19, 2002 *Petition for Reconsideration and Second Motion to Reopen the Record (Petition)*. In support whereof, the following is respectfully submitted:

1) Section D of Mr. Small's *Petition* discusses that a non-party to this rulemaking proceeding threatened Mr. Small with a civil suit if he filed any more pleadings with the Commission in this rulemaking proceeding. The *Petition*, at 23 n. 20, states that Mr. Small was, in fact, served with a civil summons just as the *Petition* was being finalized for filing. Mr. Small was served on Sunday August 18, 2002, and the *Petition* was filed on Monday August 19, 2002. Because the 30 day petition for reconsideration period has not yet expired, it is appropriate to consider the instant pleading to consider the new circumstance which arose during the middle of the instant pleading cycle. *See* 47 C.F.R. § 1.429(d) (leave to file supplement required only if 30 day reconsideration period has expired); § 1.429(b) (interested parties are permitted to present new facts via petition for reconsideration). Moreover, because the Commission's practice in this case has been to publish the filing of petitions for reconsideration in the Federal Register before requiring a responsive filing from WNNX, and because that deadline is not yet established, WNNX is not prejudiced by the filing of the instant supplemental information.

2) On or about August 15, 2002 a company called Bridge Capital Investors II (Bridge) filed a civil suit against Mr. Small in the United States District Court for the Middle District of Georgia (Case No. 3 : 02-cv-80). The suit claims that Mr. Small is breaching a contract Mr. Small entered into with other parties, Thomas Gammon and two of his companies, which contract purportedly prohibits Mr. Small from litigating his position in this rulemaking proceeding. Mr. Small shall, in due course, and in the appropriate forum, deny all allegations that he breached any contract with any party. Moreover, Bridge's law suit is frivolous because, *inter alia*, a) Bridge is not a contracting party; b) the agreement has a confidentiality clause and Bridge did not file the contract under seal

as if there were no contract and apparently in an effort to place the agreement into the public record for WNNX's use in the instant Commission rulemaking proceeding; c) Bridge's civil claim that Mr. Small is "blocking" the relocation of Station WHMA to the Atlanta Urbanized Area is belied by the very obvious fact that Station WHMA is currently sitting in the middle of downtown Atlanta;¹ and d) Bridge spectacularly fails the addressability prong of the Federal standing test by stating at page 10 of the *Complaint* that "Small's unlawful interference, in fact, renders it likely that BCI will **never** collect the Payment" (emphasis in original) and Bridge's *Complaint* concedes that its suit against Mr. Small is truly about nothing.²

3) Because Bridge's civil suit is frivolous on its face, Bridge's civil action is retaliatory and was filed to harass Mr. Small in an effort dissuade him from presenting information to the Commission. As discussed in Section D of the *Petition*, Bridge's civil action and its purpose constitute a very serious abuse of the Commission's processes. The Commission must determine

¹ It would seem, at first blush, that perhaps the attorneys who drafted Bridge's *Complaint* were not informed of this fact. However, the *Complaint* subsequently notes that "the Station is currently operating from College Park, GA pursuant to a non-final FCC construction permit." *Complaint*, at 9 ¶ 29. Of course, Station WHMA "operates" from Atlanta, but is licensed to College Park, a part of FCC practice which Bridge fails to understand. The fact that Station WHMA "operates" from Atlanta is one that the Commission has thus far ignored. If Sapphire/Bridge/Hoyt Goodrich need a "final order" in the instant proceeding because of some arrangement with WNNX to which Mr. Small was not privy and had no notice, Sapphire/Bridge/Hoyt Goodrich apparently made a monumental, for them at least, contracting error. By pegging payment to finality rather than, for instance, commencement of station operation when the benefit begins to flow to the station operator, Sapphire/Bridge/Hoyt Goodrich evidenced the lack of even the slimmest modicum of foresight. Sapphire/Bridge/Hoyt Goodrich's lack of contracting acumen on what should have appeared to be a very obvious point is not the Commission's, or Mr. Small's, concern.

² In the 11th circuit where Bridge filed the civil suit "the burden is on the party seeking to exercise jurisdiction to allege and then to prove facts sufficient to support jurisdiction" including that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Pittman v. Cole*, 267 F.3d 1269, 1282 (11th Cir. 2001). Not only has Bridge utterly failed to allege that a decision against Mr. Small would redress Bridge's claimed injury, Bridge has affirmatively stated that "it is likely that BCI will **never** collect the Payment." (Emphasis in original). Because the *Complaint* concedes that the alleged injury is not redressable by the action Bridge filed against Mr. Small, Bridge lacks standing and the suit is frivolous on its face.

whether WNNX had any role in this retaliatory suit in as much as WNNX would benefit from having the instant litigation terminated and because WNNX and Bridge have an ongoing contractual relationship. The concern about whether WNNX is involved in the improperly initiated civil suit would be heightened were WNNX to make use of any unproven allegation from that civil complaint to try to make headway in the instant proceeding. WNNX's use of any material from Bridge's civil suit would give the appearance that the civil suit was filed for the purpose of affecting the instant rulemaking proceeding and would abuse of the Commission's processes.

4) Regarding what can only charitably be referred to as the "merits" of Bridges' suit, it is well settled that the Commission does not resolve contract claims or consider contractual allegations in its proceedings. See e.g. *Martin W. Hoffman*, 15 FCC Rcd. 22086 ¶ 23 (FCC 2000) citing *Listeners Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) ("noting longstanding Commission policy of refusing to adjudicate private contract law questions for which a forum exists in state court"). In *Martin W. Hoffman* the Commission denied a request to defer action on a proposed settlement in a broadcast licensing proceeding based upon a claim that approval of the settlement agreement would result in a breach contract. The FCC determined, as it always does, that it does not resolve contract disputes or make its determinations based upon perceived contractual wrongs and that parties alleging contractual breach must present their claims to the appropriate forum.³ Thus, while Mr. Small is not bound by any contract which precludes him from litigating in the instant action, even if he were, the Commission would not consider contractual matters if those matters had not been resolved by a tribunal established to process contractual claims.

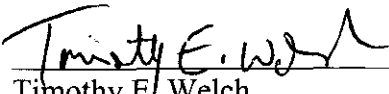
³ Given the Commission's record in the instant case of ignoring Mr. Small's arguments and ignoring long standing precedent when it is beneficial to Mr. Small's position, Mr. Small requests that if the Commission determines to change its long standing rule against considering contractual claims, without notice or a rulemaking proceeding, a course of action to which Mr. Small objects, that Mr. Small be permitted to present his contractual defenses via supplement.

5) Finally, the *Complaint*, at 8, uses as a factual predicate that Mr. Small's December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* "was a 'wholly unsupported claim'" which was in part "frivolous."⁴ Obviously, if Bridge is going to rely upon the Commission's language from the November 8, 2001 *Memorandum Opinion and Order* to Mr. Small's detriment, Mr. Small is well within his rights to argue those findings as he did in his just filed August 19, 2002 *Petition for Reconsideration and Second Motion to Reopen the Record*. The decision to seek review of those determinations is not only necessary, but must be obvious even to Bridge who cannot reasonably complain that the August 19, 2002, petition is merely obstructive.⁵

WHEREFORE, in view of the information presented herein and in the earlier submitted documents, it is respectfully submitted that reconsideration is warranted, that the Commission find that Bridge has abused the Commission's processes, that the Commission determine the extent of WNNX's involvement in the abuse, and that Mr. Small's proposal be granted.

Hill & Welch
1330 New Hampshire Ave., N.W. #113
Washington, D.C. 20036
(202) 775-0070
(202) 775-9026 (FAX)
welchlaw@earthlink.net
September 3, 2002

Respectfully submitted,
PRESTON W. SMALL


Timothy E. Welch
His Attorney

⁴ The Commission did not find the whole pleading unsupported. As discussed in Mr. Small's August 19, 2002 *Petition*, the Commission incorrectly determined that Mr. Small's argument that he must be permitted an opportunity to present his entire case was unsupported. The Commission did not rule that other portions of the pleading were unsupported as Bridge has incorrectly informed the US District Court.

⁵ That said, it is noted that the Commission now appears to be operating under a procedure in which Mr. Small is not entitled to argue against Commission findings and rationale after the opportunity first arises. That is a matter for the court of appeals to consider if that eventuality should arise.

CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of September 2002 served a copy of the foregoing MOTION FOR LEAVE TO SUPPLEMENT PETITION FOR RECONSIDERATION AND SECOND MOTION TO REOPEN THE RECORD by First-Class United States mail, postage prepaid, upon the following:

Mark N. Lipp
Shook, Hardy and Bacon
600 14th Street, N.W. Suite 800
Washington, D.C. 20005-2004

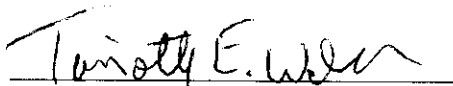
Kathy Archer, Vice President
CapStar Broadcasting Partners
600 Congress Avenue #1400
Austin, TX 78701

Joan Reynolds
Brantley Broadcast Associates
415 North College Street
Greenville, AL 36037

James R. Bayes
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Kevin F. Reed
Dow Lohnes & Albertson PLLC
1200 New Hampshire Ave., N.W. #800
Washington, D.C. 20036

Erwin G. Krasnow
Verner Liipfert Bernhard McPherson and Hand
901 15th Street, N.W.
Washington, D.C. 20005


Timothy E. Welch